STATEMENT

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DEPARTMENT OF THE INTERIOR

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FOR THE OVERSIGHT HEARING ON THE INDIAN GAMING REGULATORY ACT

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Good Morning Mr. Chairman and Members of the Committee. My name is Sharon Blackwell, Deputy Commissioner of Indian Affairs. I am pleased to be here today to present an overview on the role of the Secretary of the Interior (Secretary) in the implementation of the Indian Gaming Regulatory Act of 1988 (IGRA).

At the outset, let me state that the Department strongly supports the underlying purpose of the IGRA to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. Since the enactment of IGRA in 1988, many Indian tribes have come to consider gaming as an effective means of generating revenue to fund tribal programs and to stimulate economic development on economically stagnant or depressed Indian reservations. Although precise financial data may not be readily available, there is no question that Indian gaming is working as a tool for tribal economic development, and as a matter of Federal policy, the Department supports tribally-owned gaming under IGRA.

As you know, Congress has placed regulatory and enforcement functions under IGRA with the National Indian Gaming Commission (NIGC), and the role of the Secretary is to implement specific residual statutory functions under the Act. These functions are as follows: (1) Approval of Class III gaming compacts between Indian tribes and states; (2) Approval of revenue allocation plans for per capita payments of gaming net revenues to tribal members; (3) two-part determinations under Section 20(b)(1)(A) of IGRA; (4) Promulgation of Class III gaming procedures in circumstances where a tribe and a state cannot agree on the terms of a compact, and 5) the appointment of the two associate members of the National Indian Gaming Commission. In addition, and although IGRA does not refer to these functions specifically, the Department is also involved in reviewing applications to place land into trust for gaming, reviewing gaming-related land leases, reviewing certain gaming-related agreements for services relative to Indian lands under 25 U.S.C. Section 81, and making legal determinations regarding whether parcels of

land qualify as "Indian lands" under IGRA.

I will now turn to an overview of how the Department has implemented some of these functions.

IGRA provides that Class III gaming activities shall be lawful on Indian lands only if such activities are, among other things, conducted in conformance with a tribal state compact entered into by an Indian tribe and a state and approved by the Secretary. The Secretary may only disapprove a compact if the compact violates (i) any provisions of IGRA; (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands; or (iii) the trust obligations of the United States to Indians. The Secretary must approve or disapprove a compact within 45 days of its submission, or the compact is considered to have been approved, but only to the extent the compact is consistent with the provisions of IGRA. A compact takes effect when the Secretary publishes notice of its approval in the Federal Register. As of today, the Department has approved 212 compacts in 24 states for Class III gaming between Indian tribes and states. The Department takes the position that amendments to compacts are subject to the review and approval of the Secretary under IGRA.

If an Indian tribe and a state are unable to reach agreement on the negotiation of a compact, IGRA provides a statutory scheme that can result with the issuance of Class III gaming procedures by the Secretary. To date, the Secretary has issued Class III procedures for only one tribe: the Mashantucket Pequot Tribe of Connecticut on May 31, 1991.

The statutory framework for the issuance of Class III procedures under IGRA was destabilized when the Supreme Court, in 1996, ruled, in *Seminole Tribe v. State of Florida*, that the State may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by a tribe alleging that the State did not negotiate in good faith. After the Seminole decision, states were left with the power to veto IGRA's dispute resolution scheme, and hence with the ability to stalemate the compacting process. To provide a remedy to the problem created by the *Seminole* decision, the Department published a rule on April 12, 1999, at 25 CFR Part 291, authorizing the Secretary to promulgate Class III procedures in limited circumstances when a state and a tribe are unable to voluntarily agree to a compact, and the state has asserted its immunity from suit brought by an Indian tribe under IGRA. To date, 7 tribes have filed an application with the Bureau of Indian Affairs(BIA). The BIA rejected 3 of these applications, and is still considering the applications of the other four tribes (Seminole Tribe of Florida, Miccosukee Tribe of Florida, Santee Sioux Tribe of Nebraska, and the Confederated Tribes of the Colville Reservation of Washington). The Secretary, of course, will abide by the commitment of her predecessor not to issue Class III procedures for any tribe until a final decision is rendered on any lawsuit brought by a state challenging the authority of the Secretary to promulgate the regulations in 25 CFR Part 291. Currently, the State of Florida and the State of Alabama have jointly filed a lawsuit against the Secretary regarding this matter.

Under IGRA, the Secretary is charged with the review and approval of tribal revenue allocation plans relating to the distribution of net gaming revenues. Net gaming revenues from Class II and Class III gaming may be distributed in the form of per capita payments to members of an Indian tribe provided the Indian

tribe has prepared a Tribal Revenue Allocation Plan which is approved by the Secretary. Absent an approved Revenue Allocation Plan, IGRA constrains the use of net revenues to the following purposes: (i) to fund tribal government operations and programs; (ii) to provide for the general welfare of the Indian tribes and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. On November 10, 1999, the BIA moved the authority to approve revenue allocation plans from the 12 Regional Directors to the Deputy Commissioner of Indian Affairs to provide more uniformity in the review process, and on March 17, 2000, the BIA published a rule at 25 CFR Part 290 establishing procedures for the submission, review, and approval of tribal revenue allocation plans. To date, the BIA has approved 55 revenue allocation plans. The Department takes the position that amendments and modifications to an approved plan must be submitted for approval to the Secretary under IGRA.

The decision to place land into trust for the benefit of an Indian tribe is usually at the discretion of the Secretary after consideration of the criteria for land acquisitions in 25 CFR Part 151. When an acquisition is intended for gaming, consideration of the requirements in Section 20 of IGRA also apply. Section 20 prohibits Indian tribes from conducting Class II or Class III gaming activities on lands acquired in trust after October 17, 1988, unless one of several exceptions applies. To date the Department has approved 20 applications that have qualified under an exception to the gaming prohibition contained in Section 20. However, if none of the specific exceptions in Section 20 applies, an Indian tribe may still conduct gaming activities on after-acquired trust lands if it meets the requirements of Section 20 (b)(1)(A) of IGRA which provides that gaming can occur on the land if the Secretary, after consultation with appropriate state and local officials, and officials of nearby Indian tribes, determines that a gaming establishment on newly-acquired land will (1) be in the best interest of the tribe and its members, and (2) not be detrimental to the surrounding community, but only if the Governor of the state in which the gaming activities are to occur concurs in the Secretary's two-part determination. Since October 17, 1988, state Governors have concurred in only three positive two-part Secretarial determinations for off-reservation gaming on trust lands (Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin, Kalispel tribe gaming establishment in Airway Heights, Washington, and Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan). The BIA has followed a "Checklist" for gaming acquisitions issued on February 21, 1997, to inform its review of two-part determinations under Section 20(b)(1)(A) of IGRA, and published a proposed rule in the Federal Register on September 14, 2000 (25 CFR Part 292). The proposed rule established procedures that an Indian tribe must follow in seeking a two-part Secretarial determination under Section 20(b)(1)(A). The Secretary is in the process of evaluating the merits of the proposed rule issued by her predecessor.

Finally, I will touch briefly on the role of the Secretary in approving gaming-related agreements under 25 U.S.C. Section 81. The NIGC is, of course, charged under IGRA with the review and approval of management contracts. As a matter of practice, all gaming-related agreements are submitted to the NIGC for their review. If the NIGC makes a determination that a gaming-related agreement is not a management contract or otherwise subject to its review and approval under IGRA, it will forward the agreement to the BIA for a determination of whether the agreement is subject to the residual approval authority of the Secretary under 25 U.S.C. Section 81. The Department will then determine whether the agreement is

subject to approval under Section 81, and, if a determination is made that it is subject to review and approval, will determine, as trustee for the tribe, whether it should be approved. Congress substantially amended Section 81 last year, and the Department recently published regulations at 25 CFR Part 84 to implement these amendments to Section 81.

This concludes my prepared statement. I will be happy to answer any questions the Committee may have.